

NON-EVIDENTIARY HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:

Application for Certification of)	Docket No.
Duke Energy for the)	00-AFC-12
MORRO BAY POWER PLANT PROJECT)	
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CALIFORNIA ENERGY COMMISSION

HEARING ROOM A

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

WEDNESDAY, MARCH 3, 2004

1:05 p.m.

Reported by
Peter Petty
Contract No. 170-01-001

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COMMITTEE MEMBERS PRESENT

Commissioner William J. Keese, Presiding Member
Commissioner James D. Boyd, Associate Member

HEARING OFFICER AND ADVISORS PRESENT

Gary D. Fay, Hearing Officer
Rick Buckingham, Advisor to Commissioner Keese
Michael Smith, Advisor to Commissioner Boyd

STAFF PRESENT

Caryn Holmes, Staff Counsel
Margret Kim, Public Advisor

APPLICANT

Christopher T. Ellison, Esq., Ellison, Schneider &
Harris LLP
Randall Hickok, Duke Energy

OTHER PARTIES

Robert W. Schultz, Esq., City of Morro Bay
Peter Douglas, California Coastal Commission
Jon Bowers, Esq., California Coastal Commission
Tom Luster, California Coastal Commission

PUBLIC COMMENT

Jack McCurdy, CAPE
John McKinsey, Esq., Livingston & Mattesich

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P R O C E E D I N G S

1:05 p.m.

HEARING OFFICER FAY: This is a hearing of the California Energy Commission's AFC Committee for the Morro Bay Power Plant Project. It's a non-evidentiary hearing to take oral argument on questions that were posed by a Committee Notice that was dated February 4th, 2004.

The way we'd like to proceed today, after we take appearances, is that we'll let each party have a total of 20 minutes. If they would like to reserve some rebuttal time please announce that before you begin speaking, and we'll keep track of time. Your time will be subject to questions asked by the Committee, it's just a fact of life. If you're really interesting then you'll probably get more questions.

But we'll go through all the parties and all the rebuttal, and then we'll take public comment after that. I know Jack McCurdy's here from CAPE, and we also have a representative from El Segundo Project, Mr. John McKinsey.

And if anybody else in the audience would like to make public comment please contact

1 Margret Kim, who is raising her hand right now.
2 She's our Public Advisor. And we will be sure to
3 allow time after all the argument is presented for
4 public comment.

5 Now I understand that Chairman Keese has
6 some specific questions that he'd like the parties
7 to address as they make their remarks. Mr.
8 Chairman?

9 COMMISSIONER KEESE: Thank you. And we
10 did reference three specific questions on which we
11 have received brief and reply briefs from all the
12 parties. I believe they focus us to a few
13 specific issues, and I would like the parties, as
14 they discuss them, to bring them up. Perhaps at
15 the end of the presentations we can focus in and
16 just see whether we agree or disagree on the
17 specifics.

18 To get a little technical here, when
19 we're referring to Section 25523D, and the
20 question is consistency with LORS -- which I
21 believe in this case means the Coastal Act and LCP
22 -- is that a responsibility of the Energy
23 Commission?

24 If the Energy Commission should find
25 consistency, I would assume there is no need for a

1 consultation, and we would agree with that. If
2 the Energy Commission finds inconsistency, then
3 there's consultation and the Energy Commission
4 would proceed to Section 25525, and an override.

5 Stepping over to 25523B, which is the
6 broader objectives of the Coastal Act. Should the
7 Coastal Commission inform the Energy Commission
8 that this project does not meet the objectives of
9 the Coastal Act, then is it the responsibility of
10 the Energy Commission to abide by that finding,
11 unless the Energy Commission finds that to be
12 infeasible, or it will result in greater adverse
13 environmental effect?

14 So step one is Section D consistency
15 with LORS. Step two, separate, is meets the
16 broader objectives of the Coastal Act.

17 A couple of specific items that I'd like
18 to also deal with are the LCP, the Local Coastal
19 Plan. if the project does not involve any
20 activity below, I guess we call it the mean high
21 water mark, if there is not activity other than
22 upland of the mean high water mark, that is the
23 LCP determination done by the entity that was
24 granted that.

25 Or does the Coastal Commission retain

1 jurisdiction separate and apart from its appellate
2 jurisdiction?

3 And I guess my final question is, when
4 the Energy Commission has conducted evidentiary
5 hearings and has received all evidence, and the
6 evidence on an issue is unanimous, there is total
7 concurrence in one decision, can a later
8 recommendation, after the evidentiary process has
9 stopped, that goes the other direction, be
10 considered by the Energy Commission?

11 I don't believe that we need to discuss
12 in an extended fashion the issue that's been
13 raised about the timeliness of the report, or
14 whether the Coastal Commission's report does not
15 have to be delivered because we are in an AFC
16 process and not in the NOI process that we --
17 we're probably not going to have coal-fired plants
18 on the coastline, I guess is the best way --.

19 I am concerned, however, if we accept
20 the gist of the legislation, with its internal
21 inconsistencies, it seems to me that the
22 suggestion of the legislation is that the report
23 should be to the Energy Commission -- the report
24 from the Coastal Commission -- should be to the
25 Energy Commission at the earliest possible stage

1 in the proceedings.

2 And that's not the way it's been, the
3 last few cases the report has come after all the
4 evidentiary reports are completed, which creates
5 difficulties for us. So, as I say, I don't
6 believe that's an operative issue before us, I
7 would hope that perhaps in the future we could
8 change that process, but I don't -- if parties
9 would care to comment on that, they're welcome.

10 Mr. Fay.

11 HEARING OFFICER FAY: Thank you, Mr.
12 Chairman. What I'd like to do, just in the
13 interest of time, rather than have everybody pop
14 up to the mike for introductions, when you do come
15 up, please introduce yourself, who you're
16 representing, and who your associates are. That
17 would help the Court Reporter, and help the rest
18 of us as well.

19 So we'll begin -- first of all, are
20 there any questions about how we plan to proceed?
21 I see no indication, we'll begin with the
22 representatives of Duke Energy.

23 MR. ELLISON: Thank you, Mr. Chairman,
24 Commissioner Boyd, Hearing Officer Fay. Chris
25 Ellison, representing Duke Energy/Morro Bay LLC.

1 With me today is Mr. Randy Hickok, also
2 representing and with Duke.

3 I'm going to be very brief. All parties
4 have all filed extensive briefs on this issue, and
5 I think quite good briefs on all sides of this
6 question. I think you've got on paper all of the
7 arguments that can be made on all sides. What I
8 want to focus on -- and you've also got excellent
9 attorneys working for you who can look at all of
10 that and advise you.

11 So I'm not going to repeat a lot of what
12 we've said in our opening and reply briefs. I do
13 want to address a couple of things. I want to
14 address Duke's bottom line interest here. I also
15 want to address a couple of points that were made
16 in the reply brief that we didn't respond to. And
17 then I also want to make a couple of observations
18 about how I think this might best be resolved
19 going forward.

20 Let me start with -- and I'm of course
21 available for any questions you may have. Let me
22 start with Duke's interest here. It is obviously
23 not in Duke's interest to be caught in a turf
24 battle between the city, the Coastal Commission,
25 and the Energy Commission. And I don't think it's

1 any Applicant's interest to be in that posture.

2 It certainly wasn't anything that we
3 intended to create. And I don't think it's a
4 particularly good environment for resolving these
5 kinds of jurisdictional questions, to resolve them
6 in the context of a specific case.

7 I think my hope and recommendation and
8 Duke's hope and recommendation is that we find a
9 way to resolve these sorts of issues and create a
10 clear permitting path in California on some sort
11 of cooperative basis between the Energy
12 Commission, local government, and the Coastal
13 Commission. Whether that's through legislation or
14 through the Governor's Office or through a
15 Memorandum of Understanding or whatever.

16 With that in mind, what Duke has
17 proposed in its briefs in this is the following.
18 One, we think that the Energy Commission should
19 reaffirm -- and we believe this to be true -- that
20 it has considered all of the specific
21 recommendations in the Coastal Commission's
22 report, and it has adopted all of them except
23 those for which you made specific findings that
24 they were not feasible or they were less
25 environmentally protected.

1 I think that's something that's been
2 lost in this debate, I think it's important. I am
3 unaware of any recommendation made in the Coastal
4 Commission's report that you did not either adopt
5 or make those findings with respect to. And I
6 think it's important to recognize that and to
7 reaffirm that.

8 Secondly, Duke believes its project does
9 comply with the Coastal Act and with the LCP.
10 That was the unanimous testimony of every expert
11 witness that testified on this issue in your
12 hearings, including the city, and including your
13 staff. So we would ask that you reaffirm that.
14 But we recognize that that's obviously a point of
15 controversy here, and we recognize that the
16 Coastal Commission disagrees.

17 And with that in mind we also recommend
18 that you make, in the alternative, if you will,
19 having reaffirmed your opinion of compliance, that
20 you also go ahead and make the 25525 override
21 findings with respect to any alleged non-
22 compliance.

23 And the purpose for that, if you will,
24 is to preserve the parties from some more generic
25 form, some MOU as I suggested or something like

1 that, rather than to try and litigate this issue
2 in the context of a specific project.

3 I think there is agreement among all the
4 parties that the Energy Commission does have that
5 power under 25525, regardless of who's position on
6 compliance that you came to. So if you do those
7 things I think it renders moot, for this project,
8 the issue about who has authority over binding
9 compliance. So that's Duke's recommendation.

10 We think, as does your staff, that the
11 25525 override findings can and should be made.
12 We think the record already put together strongly
13 supports a finding that the project serves the
14 public convenience and necessity, and I think the
15 record that you've compiled also shows that
16 there's no alternative that meets that public
17 convenience and necessity other than this project.

18 You've spent a great deal of time and
19 effort in this proceeding looking at a wide
20 variety of alternatives, and you've made very
21 specific findings with regard to them.

22 Let me offer a couple of observations on
23 legal issues that were not covered in our brief,
24 and then a couple of observations about, if there
25 is a generic solution, what I think is important,

1 at least from the Applicant community's
2 perspective about that.

3 With respect to 25523B, the suggestion
4 has been made that that covers not just
5 recommendations or project conditions, but also
6 requires the Energy Commission to adopt findings
7 of compliance or non-compliance.

8 It's our view that it's 25523D that
9 addresses the issue of compliance and non-
10 compliance, and that section, 25523D, says quite
11 clearly and unequivocally, that the Energy
12 Commission shall make findings with regard to
13 compliance with all applicable state laws. And
14 its when the Energy Commission finds that there's
15 non-compliance that the override findings need to
16 be made.

17 In comparison, if you look at 25523B,
18 which governs the issue of the Coastal Commission
19 report, the language there is very precise, and it
20 speaks to recommendations. There's no mention of
21 a compliance finding in that section.

22 And the point that I want to make that
23 we didn't make in our reply briefs was if you also
24 look at the findings that are set forth in 25523B
25 for not following the Coastal Commission's

1 recommendations, namely feasibility and more
2 environmentally protective, those don't make any
3 sense if you're talking about a compliance
4 finding.

5 A compliance finding isn't feasible or
6 not feasible, it isn't environmentally protective
7 or not protective. The language of 25523B very
8 strongly suggests that the Legislature was
9 thinking about project recommendations and project
10 conditions, as opposed to a compliance finding.
11 And that's also supported by the fact that
12 compliance is addressed elsewhere, in 25523D.

13 The second point that I would make is
14 that both the Energy Commission staff and the
15 Coastal Commission staff have referenced a couple
16 of provisions that in a very broad and general way
17 suggest that the Coastal Commission's
18 recommendations comply to all the Energy
19 Commission proceedings.

20 I think the Energy Commission staff
21 pointed to the language in 25523B that speaks to
22 each project in the coastal zone. The Coastal
23 Commission staff pointed to some language in the
24 Coastal Act that speaks to a report for all
25 projects within the jurisdiction of the Energy

1 Commission.

2 The other point I would make with
3 respect to that very broad language, apart from
4 the fact that it is very general and broad, is
5 that at the time it was written all projects at
6 the Energy Commission had to go through NOI and
7 the AFC. But the requirmenet for a report in the
8 NOI necessarily applied to every project in the
9 coastal zone.

10 That's no longer true now. So when you
11 look at that language, and recognize what the
12 state of the law was when it was written, it
13 really doesn't help you decide about this question
14 of the AFC versus the NOI. The sections that
15 provide guidance on that are the specific
16 questions in which the Legislature had to choose
17 where this report should be filed.

18 And I think the law on that is quite
19 clear. You've asked that we not spend much time
20 on that, so I won't say any more about that.

21 Let me conclude with some observations
22 on the problem going forward that are illustrated
23 in this case, but I think are important in
24 whatever solution the agencies and local
25 government come up with.

1 First and foremost, from an Applicant's
2 perspective, and I think from everybody's
3 perspective, it's crucial that you not create
4 legal Catch-22 situations, where you cannot comply
5 with one law without breaking another. And you've
6 got that in this situation.

7 The law requires -- and this addresses
8 one of your specific questions, Chairman Keese --
9 the law requires that you make your findings based
10 upon conclusions of law and findings of fact, and
11 it requires that those findings of fact be based
12 upon substantial evidence in your hearing record.

13 If you do not do that, if you make a
14 finding that's not based upon substantial evidence
15 in your hearing record, you are in violation of
16 statutory and case law, and are subject to
17 litigation.

18 So if you set up a situation where the
19 Coastal Commission report doesn't come through
20 your hearing process, but comes in outside of it,
21 after the record is closed, you are creating this
22 potential Catch-22. And you've got that in this
23 particular case, and let me give you two quick
24 examples.

25 The Coastal Commission report on the

1 compliance, we've already discussed the fact that
2 all the witnesses that testified in your hearing
3 were unanimous that the project complies with the
4 Coastal Act and with the LCP, that's your record,
5 that's the substantial evidence that you have in
6 front of you.

7 To adopt a contrary recommendation would
8 be without substantial evidence to support it in
9 your hearing record.

10 Another more specific example is, the
11 Coastal Commission adopts a number of proposed
12 findings in the staff's final staff assessment,
13 one of which for example was that Duke be required
14 to pay for biological mitigation for the paving of
15 the road in front of the plant. Those of you who
16 sat through the extensive hearings on this will
17 remember this issue, that that, in the final staff
18 assessment issue, was designated as habitat for
19 the Morro shoulderband dune snail.

20 Well, in the hearing process, the staff
21 that recommended this essentially acknowledged in
22 the cross-examination that dune snails that would
23 be found on that road would be "road kill", and if
24 they weren't road kill they would be getting off
25 the road as fast as they could.

1 Well, that's the record that you have
2 for that being critical habitat, and
3 understandably, with that kind of record in front
4 of you, you deleted that portion of the
5 mitigation.

6 The Coastal Commission staff, and the
7 Coastal Commission's report, nonetheless coming in
8 after the hearings, recommends that you require
9 Duke to fund this mitigation, for the paving of
10 this pre-existing, fully maintained road.

11 You have no evidence in your record that
12 that's critical habitat, and again you would be
13 caught in this Catch-22 of on the one hand if you
14 decide that the law requires you to adopt the
15 Coastal Commission's recommendation, then it would
16 be in conflict with the law that also requires you
17 to have substantial evidence.

18 So, as you work this problem out, and
19 I'm sure you all will going forward, I think it's
20 very important from the Applicant community's
21 perspective, and from the perspective of making
22 decisions that survive scrutiny in the courts,
23 that you find some way to ensure that there is
24 substantial evidence in the Commission's hearing
25 record for the recommendations that the Coastal

1 Commission chooses to make.

2 Similarly, from the Applicant's
3 perspective, I think it's also important that the
4 one stop siting process be preserved. That was
5 the essence of why the Energy Commission was
6 created. I think it goes to the very foundation
7 of the agency's existence. it's obviously
8 important, from the Applicant's perspective, that
9 that be preserved. I don't think I need to say
10 much more about that.

11 So with that, let me just reiterate that
12 Duke is hopeful that we can find a solution here.
13 We think we've recommended one that preserves the
14 positions of the parties for a future negotiation
15 on a generic basis.

16 We're not interested in trying to solve
17 jurisdictional issues in this case, we'd simply
18 like to move forward with a project that
19 modernizes an existing plant, reduces its impacts,
20 and provides benefits to a wide variety of people.
21 Thank you very much.

22 COMMISSIONER KEESE: If we have
23 questions, I'll reserve them for later.

24 HEARING OFFICER FAY: Mr. Ellison, just
25 briefly, don't you think that, putting on your

1 officer of the court hat for a moment, that given
2 this sort of confusion or potential confusion
3 between these statutes, 25523B and 25525, that the
4 Commission is obliged to attempt some
5 harmonization that they think can make sense of
6 the legislative intent behind both statutes, both
7 the Coastal Act and the Warren-Alquist Act, as
8 opposed to a very strict literal reading that
9 might be literally correct, but somehow at odds
10 with the apparent intent of providing information
11 to this body?

12 MR. ELLISON: Well, as you know, Mr.
13 Fay, what the law requires you to do is to attempt
14 to do both things. To respect the strict language
15 of the Legislature, and if you can find rational
16 -- well, what the law requires you to do is follow
17 the strict language unless it's ambiguous.

18 If it's ambiguous then you look to
19 intent. But you don't substitute your idea of
20 intent for the clear wording of a statute. Having
21 said that, I think in this case you don't really
22 face that problem. I mean, I think there is
23 certainly some ambiguity as between 25523B and
24 25523D and 25525, but that can be harmonized by
25 looking at the specific language that the

1 Legislature used.

2 If you look at 25523B and its specific
3 language of recommendations regarding the project,
4 and if you look at 25523D as addressing findings
5 of compliance -- and that is what the strict
6 language of those two statutes say -- that
7 resolves any potential conflict between the two
8 different overrides that you have to make.

9 If you interpret 25523B, however, away
10 from its specific language, as applying also to
11 compliance, then you have created an ambiguity
12 that didn't exist before that.

13 HEARING OFFICER FAY: Thank you. All
14 right, now we'll hear form the staff, Energy
15 Commission staff?

16 MS. HOLMES: Thank you. Good afternoon,
17 Caryn Holmes representing the Energy Commission's
18 staff.

19 The staff's position on these issues, I
20 believe, is easy to understand, strikes a sensible
21 balance between the interests and the
22 responsibilities of all the affected entities, and
23 we believe reflects the most reasonable
24 interpretation of the relevant statutes.

25 In short, what we're saying is, where

1 the Coastal Commission has identified specific
2 provisions that are necessary to meet the
3 objectives of the Coastal Act, then the Energy
4 Commission cannot find that the project is
5 consistent without those provisions.

6 If the Energy Commission chooses to
7 continue and license such a project, it can do so,
8 it just needs to make the necessary findings
9 identified in the statute.

10 That's all we're saying. We're not
11 saying for example that the Energy Commission
12 lacks exclusive jurisdiction over the project, or
13 that any other entity has a final say on the
14 project.

15 We're simply saying that the statute
16 identifies a specific role for the Coastal
17 Commission for projects located within the coastal
18 zone that require the CEC to incorporate the
19 provisions that they identify, unless the Energy
20 Commission makes specific findings.

21 We think that this is a reasonable
22 mechanism for accommodating the Coastal
23 Commission's responsibility in protecting coastal
24 resources while staying within the Energy
25 Commission's exclusive licensing authority.

1 I'd like to turn to the specific
2 questions and go through them briefly, and then
3 address some of the points that Chairman Keese
4 raised earlier this afternoon.

5 The first question that the Committee
6 asked is whether or not the Committee could rely
7 on the city's determination of LPC consistency.

8 Staff's answer is that because the
9 Coastal Commission is required, pursuant to the
10 Coastal Act, to assess LCP consistency, and found
11 that additional provisions are necessary to ensure
12 conformity with the LCP, the Energy Commission
13 cannot find that the project is consistent with
14 the LCP without those provisions.

15 Stated another way --

16 COMMISSIONER KEESE: So the Coastal
17 Commission, when they approve an LCP, retains
18 separate jurisdiction also?

19 MS. HOLMES: I think that there's two
20 different aspects to Coastal Commission
21 jurisdiction over these projects. The first has
22 to do with the fact that the Coastal Commission is
23 specifically directed to address LCP conformity,
24 in 3413, the section of the Coastal Act that
25 directs them to prepare their report.

1 So in these specific instances, where
2 you have Energy Commission projects that are
3 located within the coastal zone, it is the coastal
4 zone that's directed by the Legislature to assess
5 LCP conformity.

6 COMMISSIONER KEESE: And there isn't a
7 role for the agency that received an approval on
8 that LCP?

9 MS. HOLMES: I think that, absent
10 Energy Commission jurisdiction, surely the local
11 agency would be the initial agency that acted to
12 determine LCP consistency, but the Coastal
13 Commission also retains appellate jurisdiction --

14 COMMISSIONER KEESE: Correct.

15 MS. HOLMES: -- over that determination.
16 No, I think that, perhaps a more direct way to
17 answer your question is that, with respect to this
18 particular agency, the Legislature has established
19 a specific role for them, and for determination of
20 consistency with the LCP and the Coastal Act.

21 In a situation for a project that was
22 not located within the coastal zone, the local
23 government would make a determination or a
24 recommendation to the Energy Commission about
25 consistency with their local laws, and pursuant to

1 the Energy Commission's regulations and practice,
2 we would be giving that determination great
3 weight.

4 But this situation is different because
5 of the specific role that the Legislature has
6 identified for the Coastal Commission in
7 determining LCP consistency, and with regard to
8 the fact that the Coastal Commission also retains
9 appellate jurisdiction over LCP conformity, issues
10 that are contested at the local level.

11 COMMISSIONER KEESE: Okay.

12 HEARING OFFICER FAY: Go ahead.

13 MS. HOLMES: Oh, thank you. The second
14 question that you asked is whether or not the
15 Energy Commission could determine whether the
16 project is consistent with Coastal Act policies
17 independently, or whether or not it's bound by the
18 determination of the Coastal Commission.

19 And again, as I've stated before, staff
20 believes that where the Coastal Commission has
21 identified specific provisions necessary to meet
22 the policy of the Coastal Act, the objectives of
23 the Coastal Act, the Energy Commission cannot
24 independently determine that the project is
25 consistent without those provisions.

1 COMMISSIONER KEESE: So your reading of
2 25523B -- that does not give the Energy Commission
3 the responsibility for determining conformity?

4 MS. HOLMES: It does not give the Energy
5 Commission responsibility for determining
6 conformity for those policies for which the
7 Coastal Commission has made specific
8 recommendations.

9 If, for example, the Coastal Commission
10 were to --

11 COMMISSIONER KEESE: The consistency
12 with the LCP and the Coastal Act?

13 MS. HOLMES: For those provisions of the
14 LCP and the Coastal Act for which the Coastal
15 Commission has made recommendations on specific
16 provisions. If the Coastal Commission were to be
17 silent, then I believe the Energy Commission would
18 have the responsibility and the authority to
19 determine consistency with the LCP and with the
20 Coastal Act.

21 Where the Coastal Commission has not
22 addressed certain policies of the LCP or the
23 Coastal Act, then I believe the LCP has the
24 responsibility and the authority to address
25 consistency with those provisions.

1 But for those provisions for which the
2 Coastal Commission has said, in order to be
3 consistent with them you need to implement these
4 specific provisions, staff believes that the
5 Energy Commission cannot independently turn around
6 and say "no, we think that the project is
7 consistent without those provisions."

8 HEARING OFFICER FAY: Aside from that,
9 counsel, do you see that that provision, 25523D,
10 does have a role for the Energy Commission to find
11 compliance or non-compliance?

12 MS. HOLMES: Is what your asking me
13 whether, once the Commission has not adopted -- if
14 the Commission makes the findings identified in
15 25523B, what are the next steps?

16 COMMISSIONER KEESE: D, D, we're talking
17 about D.

18 MS. HOLMES: No, I'm --

19 HEARING OFFICER FAY: If they make the
20 findings under B, or conceivably if they do not,
21 they just accept it on Coastal Commission
22 recommendations, but still is there a role for the
23 Energy Commission to independently determine does
24 a project comply with LORS? In this case the
25 Coastal Act and the LCP.

1 MS. HOLMES: Yes, I think the Energy
2 Commission does need to make a finding in its
3 decision about conformity with the Coastal Act and
4 the LCP.

5 HEARING OFFICER FAY: An independent
6 finding?

7 MS. HOLMES: An independent finding,
8 with the exception of the point that I've just
9 made, which is that we could not, the Energy
10 Commission could not make a finding that the
11 project is consistent if it fails to incorporate
12 provisions that the Coastal Commission has
13 identified as necessary to achieve consistency.

14 HEARING OFFICER FAY: Okay.

15 COMMISSIONER BOYD: Looking at a room of
16 Washington lawyers, and not being a lawyer, to
17 follow this logic, the LCP becomes, in effect, in
18 this case, just one of the LORS that we hear from
19 the local city and the staff as to whether there's
20 a feeling on the part of these parties that there
21 is consistency, but there's the overriding
22 provisions of the law that provide for the Coastal
23 Commission to have its own specific requirements
24 that we must take into account?

25 MS. HOLMES: I think that's a good

1 summary.

2 The third question the Committee asked
3 is what criteria the Energy Commission should
4 apply in the event that it finds a non-compliance
5 with the Coastal Act or the Local Coastal Plan,
6 and proceeds to Public Resources Code Section
7 25525.

8 My answer to that, as I stated in the
9 brief, is simply that the provisions are
10 established, the criteria are established in that
11 provision, it's that the project would be required
12 for public convenience and necessity, and that
13 there are --

14 HEARING OFFICER FAY: Excuse me,
15 counsel. Yes, we have that in the brief, we don't
16 need to go into that. Let me ask you, the staff
17 testified that there was compliance with the
18 language of LORS, as I understand it?

19 MS. HOLMES: I'd like to correct the
20 record on that. That is an issue that we did not
21 take up in our PMPD comments. I think that people
22 will find that, if they read the record very
23 carefully, they will discover that in the Land Use
24 section of the FSA, compliance with those policies
25 addressing marine resources and terrestrial

1 biological resources were deferred to the
2 biological resources sections of the FSA.

3 And I believe that if they read the
4 aquatic biological resources section of the FSA,
5 staff's position was that the final determination
6 of consistency with the Coastal Act policies
7 protecting marine sources would be determined by
8 the Coastal Commission, but that it appeared to us
9 -- and here I'm paraphrasing -- it appeared to us
10 that there would need to be a substantial
11 reduction in water use for the projects to comply
12 with those provisions, and that the project as
13 currently proposed does not include those types of
14 provisions.

15 HEARING OFFICER FAY: Okay, we'll check
16 that. Nevertheless, the city -- and I believe
17 Duke -- provided evidence that there was
18 compliance with the LCP, and that was the sum of
19 our evidentiary record on that point.

20 After the evidentiary hearings the
21 Coastal Commission adopted its report, and if you
22 recall the dilemma that Mr. Ellison brings, what
23 is your view on how to deal with that?

24 Under the Topanga case we have to have
25 substantial evidence on which to base findings,

1 but I presume the Coastal Commission would argue
2 that that is trumped by the statutory provision
3 that the Energy Commission must either adopt or
4 make contrary findings regarding the specific
5 provisions of the Coastal Commission's report.

6 MS. HOLMES: Well, I think there's two
7 aspects to your question. First is whether or not
8 the report was submitted prior to a hearing as
9 opposed to simply entered into the record via
10 administrative or judicial notice.

11 And if you'll recollect, staff had
12 recommended that the hearing record be reopened,
13 specifically to hear, to receive the Coastal
14 Commission's report. We stand by that
15 recommendation. We think that that would be the
16 most sensible way to deal with that particular
17 aspect of it.

18 HEARING OFFICER FAY: Isn't that putting
19 form over substance? I mean, it's supposed to
20 come in for a hearing, but the hearing process has
21 a certain flow. if we have a hearing for that
22 purpose after everybody's done we can't really
23 take that information in in a timely way.

24 And I guess the problem is exacerbated
25 in this case because the Coastal Commission report

1 came in after the evidentiary hearings. If it had
2 come in during, those disagreements could have
3 been addressed by all of the parties in real time,
4 so that the contrary testimony could have been
5 cross-examined and the Coastal Commission's
6 recommendations could have been cross-examined.

7 MS. HOLMES: Well, I'd like to make a
8 couple of points on that. The first point would
9 be that I don't think there was anything new in
10 the Coastal Commission report. I think that most
11 of the points, if not all of the points that they
12 raised, and the responses of the Applicant to the
13 report, concern issues that were addressed
14 extensively during the Energy Commission's
15 hearings.

16 The second point is that, if the
17 Committee chooses to reopen the record, the staff
18 had recommended for the purpose of receiving that
19 report that that hearing of course would be the
20 opportunity for people to raise issues that had
21 not been fully litigated that concerned the report
22 and its implications for the project.

23 The third point that I would like to
24 make is that, in terms of whether or not there is
25 substantial evidence, staff believes that the

1 Coastal Commission report, which is on the record
2 now as a result of the Committee taking official
3 notice of it, is in fact substantial evidence of
4 it and the valid basis for a decision.

5 HEARING OFFICER FAY: Okay. Given all
6 that, what would you recommend, in an ideal
7 situation going forward, as to timing of the
8 Coastal Commission report?

9 MS. HOLMES: Are you asking when in the
10 future I recommend that the Coastal Commission
11 report be received?

12 HEARING OFFICER FAY: Yes.

13 MS. HOLMES: I think it would be best,
14 and would allow the most complete airing of all
15 the issues, if the Coastal Commission report were
16 due at the same time as the staff and applicant
17 testimony for the evidentiary hearings.

18 HEARING OFFICER FAY: And that would be
19 consistent with the timing that is stated in the
20 Coastal Act regarding the report coming in an NOI
21 proceeding, is that correct?

22 MS. HOLMES: That's correct, and I would
23 point out that the original provisions of the
24 Coastal Act had the report coming in simply prior
25 to the decision on the NOI and there was an

1 amendment in 1978 that required the report to be
2 submitted prior to the hearings on the NOI.

3 COMMISSIONER BOYD: Perhaps to avoid
4 situations like we're engaged in today?

5 MS. HOLMES: Perhaps.

6 HEARING OFFICER FAY: Thank you.

7 MS. HOLMES: I'd like to address a
8 couple of the issues that have been raised that
9 were not the subject of specific questions from
10 the Committee. The first one has to do with
11 whether or not the Coastal Commission's report is
12 applicable in an AFC proceeding, and staff
13 believes that it is for several reasons.

14 First of all, Public Resources Code
15 3413, which directs the Coastal Commission to
16 prepare the report, applies whenever the Energy
17 Commission undertakes a siting proceeding.
18 There's no language that says that it is required
19 only when there are NOI's filed and not AFC's.

20 Secondly, in response to Mr. Ellison's
21 point, although perhaps I shouldn't be raising
22 this since it is rebuttal, but I was going to make
23 it anyway, with respect to the findings that the
24 Energy Commission must make, I think that it's
25 telling that the Coastal Commission report is

1 culled out separately in both the NOI decision
2 that the Commission must make and the AFC
3 decision.

4 In fact, the section 25523 specifically
5 requires the Energy Commission to include the
6 provisions that the Coastal Commission has
7 identified, unless it makes the findings. It does
8 not say that that applies only when the AFC is
9 proceeded by an NOI.

10 It would have been very simple for the
11 Legislature to say that the Coastal Commission
12 provisions must be addressed only in the
13 Commission's NOI decision, and doing so would have
14 indicated an attempt, I believe, that the Coastal
15 Commission report only be provided during an NOI
16 process.

17 But since the Legislature saw fit to
18 direct the Energy Commission to address the report
19 in the AFC decision, I think its quite clear that
20 the report has a place in that proceeding as well.

21 I'd like to address some concerns that
22 were raised by the Applicant in its pleadings
23 having to do with the so-called one stop shop. If
24 I understood the Applicant's claims correctly,
25 they're stating that the Energy Commission staff,

1 and presumably the Coastal Commission's
2 interpretation of these statutes, undermines the
3 Commission's exclusive authority to license power
4 plants. I think that's something of a
5 misrepresentation of our position.

6 Nothing we have said, in our briefs or
7 here today, can be interpreted to say that another
8 agency exercises any kind of licensing authority
9 over this plant or that another state, local or
10 regional permit is required.

11 We're simply trying to accommodate the
12 language that the Legislature has provided
13 identifying a specific role for the Coastal
14 Commission within the Commission's exclusive
15 jurisdiction. We believe that the interpretation
16 that we've provided does that.

17 I think I'll skip over some points,
18 because I think they'll come up during the
19 rebuttal portion of this hearing. And just in sum
20 say that I think that there is in fact in this
21 case a very simple solution that is acceptable to
22 all parties that doesn't require us to go into a
23 great deal of detail on the apparent legal
24 conundrums.

25 The Energy Commission can consider the

1 Coastal Commission recommendations, as it has. It
2 can decline to implement them, as it has by making
3 the findings of feasibility, infeasibility, or
4 greater environmental harm, which it does.

5 The Energy Commission can then say that
6 the question of whether or not this results in a
7 non-conformity that requires the Commission to
8 proceed to 25525 and consider an override is
9 unclear, but given that the Applicant does not
10 oppose the Energy Commission making such a
11 consideration, that it will do so.

12 This in some ways is not dissimilar from
13 what the Commission did with I believe it's the
14 Geyser 16 case, where it was not clear whether
15 there was a non-conformity with a local LORS, and
16 the Commission's decision said just that, that it
17 wasn't clear, but that they would proceed to make
18 the override findings in any event, in an exercise
19 of prudence and caution.

20 I think that doing so in this case will
21 solve the issues that are before this Committee in
22 this case in a way that is satisfactory to all the
23 parties.

24 COMMISSIONER KEESE: Let me try my
25 specific question again on you, as we struggle to

1 find consistency in our sections here.

2 I'm trying, I posited at the front end
3 that we may distinguish between B and D, B being
4 the objectives of the act, which are in the
5 report, and the Coastal Commission has complete
6 freedom to make all the recommendations that they
7 want as to what the greater objective is that we
8 should take into mind, and we're supposed to take
9 those into consideration, no matter what. And
10 unless we find them unfeasible or greater
11 environmental harm.

12 And D, which seems on a reading, at
13 least, Applicant is suggesting is read to say the
14 Energy Commission will determine compliance. And
15 if it finds no compliance then it will consult
16 with the Coastal Commission and attempt to resolve
17 that.

18 And if it continues to find that it's
19 not consistent then it will go to Section 25 and
20 make an override determination. So B basically
21 requires us to look at the whole thing they've
22 given us, no matter why they gave it to us, and
23 come up to a conclusion, and D does a different
24 thing.

25 It says look at LORS and decide whether

1 it's in compliance. You disagree with that, I
2 guess?

3 MS. HOLMES: Staff's position is that
4 when state legislative schemes such as the Coastal
5 Act identify policies or objectives, staff has
6 always treated those as LORS, as standards that
7 need to be complied with unless the Commission
8 makes certain specified fundings.

9 COMMISSIONER KEESE: And that's the way
10 you read D? You read D that, when it says that
11 the Energy Commission shall make, shall determine
12 consistency?

13 MS. HOLMES: Let me go, let me make sure
14 I'm using exactly their words.

15 COMMISSIONER KEESE: Okay.

16 MS. HOLMES: I think the interesting
17 thing about -- you're referring to subsection D1?

18 COMMISSIONER KEESE: Correct.

19 MS. HOLMES: If you read that very
20 carefully, you'll find that the first sentence of
21 it, that talks about the conformity of the
22 project, talks about conformity with standards,
23 talks about conformity with standards, ordinances,
24 or laws.

25 And the second sentence of that talks

1 about non-compliance with ordinances or
2 regulations. And I think that the meet and confer
3 provision applies simply to that latter section,
4 which has to do with non-compliance with
5 regulations or ordinances.

6 But it doesn't mean that the standards
7 that are referred to in the first sentence, and in
8 25523B, are not LORS that must be addressed in
9 terms of the Energy Commission's responsibility to
10 assess conformity. Did that make, is that clear?

11 COMMISSIONER KEESE: I hear what you're
12 saying. I understand what you said. If we have
13 to take B no matter what, I mean a rational
14 reading of B is that we look at this overall
15 policy and take it into consideration, we don't
16 have to do it if it's infeasible. We don't have
17 to, we have to find override, or do we just find
18 it infeasible?

19 MS. HOLMES: That's a question that we
20 stated in our filings that the Commission doesn't
21 need to address. And it is an open question.

22 If, for example, the Coastal Commission
23 recommends certain provisions, and the Energy
24 Commission finds them infeasible or they would
25 cause greater environmental harm --

1 COMMISSIONER KEESE: Well, we actually
2 dealt with them, so in this case we probably dealt
3 with almost all of them, so you're probably right,
4 we don't have to go very far.

5 MS. HOLMES: Right. The question then
6 is do you have a non-conformity which then
7 requires an override pursuant to 25525? Again,
8 staff's position is that since the project cannot
9 be consistent without those provisions, it must be
10 -- excuse me, it cannot be consistent without
11 those provisions, since the Energy Commission has
12 declined to include them it must be consistent.

13 Now, the question of whether they are
14 then required to take the additional step of going
15 to 25525, and consider it an override, is a
16 question that is somewhat ambiguous and it doesn't
17 need to be addressed in this situation.

18 I can see a legal argument that says
19 that you do not need to proceed to 25525 because
20 25523B establishes the specific findings that you
21 make for Coastal Act inconsistencies. I can also
22 see an argument that says no, Coastal Act policies
23 are entitled to the same level of deference as any
24 other LORS for which the Commission might consider
25 an override, and is therefore subject to those

1 additional findings.

2 However, given that the Applicant has in
3 this case indicated that it recommends that the
4 Commission proceed to make the consideration
5 identified in 25525, staff supports that
6 recommendation and doesn't think that we need to
7 address the quesiton of whether or not it's
8 required.

9 COMMISSIONER KEESE: We'd prefer not to
10 have a fuzzy decision coming out here. Thank you.

11 MS. HOLMES: Thank you.

12 HEARING OFFICER FAY: Thank you counsel.
13 Is there a representative of the city of Morro Bay
14 here? Please introduce yourself.

15 MR. SCHULTZ: Good afternoon, Rob
16 Schultz with the city of Morro Bay, I'm the city
17 attorney. I'm here by myself, I have no other
18 representatives from the city of Morro Bay.

19 When I discussed it with outside counsel
20 on whether they should be here I told them no,
21 there wasn't a reason, because I actually thought
22 that the issues were kind of simple and easy to go
23 through, and I think Chairman Keese has kind of
24 framed those issues.

25 There isn't a lot of disagreement

1 between the parties really, when you get down to
2 it, and what's there, if you really look at it.
3 And I think the brief's were done excellent so I'm
4 not going to go over those, I'm going to get right
5 to your questions.

6 With regards to 25523D, I think it is
7 within your purview, I think that section is
8 clear, when it states "if the Commission finds."
9 It doesn't say if a local agency finds, it doesn't
10 say if the Coastal Commission finds there's an
11 inconsistent you have to go to 525, it says "if
12 the Commission finds."

13 I think this section is separate and
14 apart from B1, it's all on its own and that's
15 within your exclusive jurisdiction to decide if
16 there is that consistency. And so you never have
17 to get to that next question of whether you have
18 to go to 525, because you've found it consistent
19 with making your own determination based upon all
20 the evidentiary hearings that went on, and that's
21 the end of the discussion.

22 But part of me is up here and don't want
23 the long legal battles also, and kind of agrees
24 with the Applicant and staff in saying that, if
25 there's a way to do it by going to 525 because you

1 can make those determinations under that section
2 then let's do them, so that everybody is happy
3 with it.

4 But I really feel that that's a simple
5 issue, I mean, it can't be unclear where it says
6 "if the Commission finds", it doesn't really talk
7 about anybody else, whether they find the local
8 agency or the Coastal Commission or anybody else,
9 it's you.

10 With regards to 523B, I think that's
11 what we've got to look at when we're dealing with
12 the Coastal Commission, and its important to look
13 at that and what it says about the Commission and
14 recommendations. And when I read Duke's brief I
15 think they hit it on the head here, tell me what
16 provisions and recommendations you have not
17 accepted from the Coastal Commission?

18 I can't find any, except for the dry
19 cooling. The recommendation was dry cooling, and
20 you certainly found through the evidence that it's
21 not feasible, so that's a dead issue, you found it
22 and that's the exception to it.

23 With regards to the HEP, and saying that
24 the HEP is not in compliance with the Local
25 Coastal Plan, they didn't provide you with any

1 provisions or recommendations on how a HEF would
2 come in compliance with the Local Coastal Plan.

3 I sat before the Coastal Commission
4 hearing and talked to staff about this, and I said
5 specifically to them, you guys are blowing it on
6 this issue, you need to provide specific
7 provisions and recommendations regarding the HEP.

8 For example, if the Coastal Commission's
9 report would have said that more money was needed
10 for the HEP program, if they had said more
11 monitoring is needed, if they would have said
12 performance guarantees over the years have to be
13 for the HEP program, I would have been hard
14 pressed to say how do you not incorporate these
15 provisions that the Coastal Commission is giving
16 you, because section B says you shall incorporate
17 those provisions unless of course the issue of
18 feasibility and greater environmental impact.

19 But they didn't provide you with any
20 provisions or recommendations. So the question I
21 have for the Coastal Commission is what provisions
22 in their report have you not incorporated into
23 your decision?

24 I think everything is there except for
25 dry cooling, and you have adequately determined

1 that it's just not feasible, so you've complied
2 with B1.

3 Your other question had to do with the
4 Local Coastal Plan and jurisdictional issues. You
5 know, in the earlier turf wars, I really don't
6 want to get into that issue with the Coastal
7 Commission, if this project --

8 COMMISSIONER KEESE: Just one sentence
9 is fine. This is another one I don't think we
10 have to get into a big debate about.

11 MR. SCHULTZ: I don't think so either.
12 If there was no Energy Commission and this project
13 was in front of us it would be within our
14 jurisdiction, it wouldn't be within the original
15 jurisdiction. But certainly in a project such as
16 this it would have been appealed to the Coastal
17 Commission and they would have had final say on
18 the project, simple as that.

19 COMMISSIONER KEESE: Okay.

20 MR. SCHULTZ: That's all I have.

21 COMMISSIONER KEESE: Thank you.

22 HEARING OFFICER FAY: Thanks, Mr.
23 Schultz. Now the Coastal Commission.

24 MR. DOUGLAS: Panel, my name is Peter
25 Douglas, and I'm the Executive Director of the

1 Coastal Commission, and I have with me staff
2 counsel Jon Bowers and our staff analyst who
3 worked on this project, Tom Muster.

4 And I would obviously be happy to answer
5 any questions anywhere along the process. It's
6 interesting for me to see how this institutional
7 division of responsibility is being actually
8 carried out, since I was the legislative
9 consultant who drafted the Coastal Act and drafted
10 this provision, and then working in a committee
11 that, at the same time, established the Energy
12 Commission.

13 And I think Chairman Keese really laid
14 out properly the way that we see how this process
15 should work, and I will at the end suggest
16 something that we might do in the future to make
17 sure that we avoid some of these obviously late
18 inputs into your process.

19 But relative to the -- and I don't think
20 we have a great deal of difference of opinion here
21 -- it's a matter of how do you get to the result
22 that you're looking for. And we agree with your
23 staff's analysis relative to the application of
24 the relative sections.

25 However, we think that the sequencing is

1 very important. The process that we think needs
2 to be followed is that when we make specific
3 recommendations, as we did on the ocean intake or
4 cooling system, then you apply 253B and you make a
5 determination of whether or not those
6 recommendations are infeasible or have a greater
7 adverse environmental impact.

8 In making the determination of
9 infeasibility, though, I think it's important for
10 the Commission not to rely on such things as
11 whether or not the LCP would, whether or not the
12 dry cooling would be consistent with the LCP,
13 because that's a determination that the Coastal
14 Commission has made relative to our substantial
15 evidence that's required for the recommendation
16 that we make.

17 So if you find specifically that this
18 recommendation is not feasible, then you've
19 overridden the Coastal Commission's
20 recommendation, and that's fine, it's within your
21 jurisdiction to do that.

22 If you can't make that finding, and you
23 then apply 253D, you've found that there's non-
24 conformance. And then you could go to 25. So
25 that's the way I think the Chairman laid it out,

1 and we don't disagree with that.

2 I think the question relative to
3 feasibility, of course, you have to make that
4 determination based on substantial evidence
5 relative to whether or not the Local Coastal Plan,
6 or dry cooling, would be consistent with that.

7 Let me just point out a couple of
8 reasons why I believe that the Coastal
9 Commission's determination there is the final
10 determination.

11 One is that our statute, that is the
12 Coastal Act, does specifically provide in Section
13 30413D5, that the Coastal Commission makes
14 findings relative to consistency or conformity
15 with the Local Coastal Plan.

16 The other reason that the Coastal
17 Commission has the final say on consistency is, as
18 other witnesses here have indicated, that this
19 project is -- if the local government had the
20 authority to issue a coastal permit it would be
21 appealable to the Commission, and there's a
22 portion of it that would be in the original
23 jurisdiction of the Commission, in which case the
24 Coastal Act applies and not the Local Coastal
25 Plan.

1 The Coastal Act sets up specific areas
2 within local jurisdictions where local decisions
3 are appealable to the Commission. If this were
4 outside the appeals area, then the local
5 governments determination with the LCP would be
6 final, unless somebody took it to court.

7 But the Coastal Commission wouldn't have
8 the ability to come in and make its determination
9 based on substantial evidence of conformity with
10 the LCP. That is only limited to the area that
11 has been specifically delineated as the appeals
12 area.

13 So there is clearly a scheme here of
14 division of responsibility between the Coastal
15 Commission and local government. So that
16 determination by the Commission of consistency
17 with the LCP over the dry cooling alternative
18 clearly is something that we have within our
19 jurisdiction to make.

20 Now relative to 525, we don't see that
21 you even have to get there. Because if you make
22 the proper determination on feasibility, then
23 you've taken care of the issue. I think you only
24 get there if you find non-conformance, and then
25 consultation doesn't work, and then you use 25 and

1 make those findings.

2 Relative to process, I think clearly the
3 fact that we're here and the way that I see this
4 process unfolding, is a one stop process. We're
5 providing input, we're not making independent
6 decisions that bind you, other than what we have
7 discussed relative to the specific
8 recommendations.

9 It's all being done before the Energy
10 Commission, and I think that's very consistent
11 with the whole idea of one stop permit that was
12 intended in the original act. So we're in
13 agreement with your staff on that determination.

14 Relative to the process -- and I can
15 ask, if you'd like to talk about that more Mr.
16 Luster can supplement what I'm going to say -- but
17 I do think that it would be a good idea for us to
18 think about putting together a Memorandum Of
19 Understanding, so that we lay out clearly what the
20 process would be and when we're expected to do
21 what.

22 Because I don't think we have a
23 difference of opinion overall in terms of how this
24 process should work, I think we're just at odds in
25 terms of what some of the findings were that were

1 relied on to determine that the dry cooling was
2 not feasible.

3 So if that's something the Commission
4 would like to do, I'm surely open to that, and I
5 think that addresses some of the concerns that the
6 representative from Duke raised too, I think there
7 are some legitimate concerns there that we ought
8 to, in the interest of good government, pursue.

9 With that, let me ask Mr. Bowers if he
10 has any additional comments he'd like to make, and
11 then of course we'll answer any questions you may
12 have.

13 MR. BOWERS: Thank you. I just have a
14 couple of additional comments I'd like to make. I
15 want to address the issue raised by the attorney
16 for the Applicant regarding the alleged tension if
17 not outright conflict between the Energy
18 Commission's obligation to accept recommendations
19 that we make in order to bring projects in
20 conformity with the Coastal Act, and the other
21 obligation to which you are subject, which is to
22 make determinations on the basis of substantial
23 evidence in the record.

24 I think that that alleged conflict
25 evaporates when you think about the fact that the

1 Commission's own, the Coastal Commission's
2 determination is one that must be supported by
3 substantial evidence.

4 We hold an evidentiary hearing in which
5 the Applicant and any other interested party has
6 the right to present evidence. Our agency's, our
7 Commission's adoption of the report that we then
8 submit to you is subject to judicial review, it
9 can be challenged.

10 However, if the Coastal Commission's
11 adoption of the report that we then submit to you
12 is not challenged, or if it is challenged and it
13 survives that challenge, then I think it is
14 entirely appropriate and proper for the Energy
15 Commission to accept our report under the
16 assumption that it is supported by substantial
17 evidence.

18 In other words, it is supported by
19 substantial evidence that was present before the
20 Coastal Commission. And that is how, it seems to
21 me, it is possible to resolve that tension or
22 conflict.

23 HEARING OFFICER FAY: Excuse me, Mr.
24 Bowers, if I can go back to the example Mr.
25 Ellison used -- and I think it was a graphic one

1 -- and the three of us up here were, well,
2 Commissioner Keese and Commissioner Boyd and
3 myself were there during these hearings -- and the
4 question of the paved road as primary habitat for
5 the shoulderband snail, the MSS, came up.

6 It was advocated by staff that, because
7 this was primary habitat, that the area of the
8 road should be compensated for and a multiplier
9 created, a certain amount of money that would go
10 into purchasing offsite compensatory habitat.

11 The Committee was not persuaded at all
12 by the evidence your staff presented, and it was
13 really a most extreme example of lack of
14 substantial evidence, and yet that provision --
15 along with a number of others that were in the
16 staff's final assessment -- were adopted by the
17 Coastal Commission staff in its report, and then
18 in turn adopted by the Coastal Commission in its
19 report.

20 So that which we heard directly, with
21 prefile testimony, looked the witnesses in the
22 eye, heard them cross-examined by other parties,
23 and reached a determination on it, found it not
24 substantial evidence to support the called for
25 mitigation.

1 Then comes by an indirect route back to
2 us as mandatory through the Coastal Commission's
3 report. Now the process that you describe, in
4 theory, perhaps could create a reliance, except
5 that it doesn't, they both don't work in sequence.
6 They're both going on simultaneously.

7 And as far as I know, the Coastal
8 Commission, during its one hour hearing on the
9 Morro Bay plan, the Coastal Commission itself, did
10 not call witnesses regarding the shoulderband
11 snail and this provision on the road.

12 So it's very frustrating for the Energy
13 Commission, just using this one example, to have
14 heard this evidence personally, and then have the
15 report come in that you're saying that we should
16 rely on as substantial evidence. How do we
17 resolve this?

18 MR. BOWERS: All I can, I'm not familiar
19 with the details of the handling of this issue.
20 Maybe Mr. Luster could address the manner in which
21 the Coastal Commission arrived at its conclusion
22 that this was a mitigation measure that was
23 necessary.

24 But all I can tell you is our hearing on
25 this report was preceded by the distribution of a

1 staff report that contained the proposed report,
2 so that the Applicant and every other interested
3 party knew well in advance of our hearing as to
4 what our recommendation was going to be, including
5 the recommendation that you're talking about.

6 They had full opportunity to present
7 evidence, testimonial or otherwise, that opposed
8 the staff's recommendation. And then the Coastal
9 Commission is the decisionmaking body in terms of
10 what we are going to include or not include in our
11 report. And that --

12 COMMISSIONER KEESE: Correct. But I,
13 you know, I will say that, Mr. Douglas' suggestion
14 that maybe we should work this out so that the
15 report comes in early probably takes care of --
16 which I would personally concur with, that that's
17 what we should do. And that may take care of
18 future problems.

19 The current problem, we did adopt most
20 of the recommendations, so that really is not an
21 issue. No matter what had occurred at the Coastal
22 Commission after the process that Mr. Fay has
23 discussed, how could we change -- when we had
24 everybody there, faced them in the eye, and came
25 to an absolute decision.

1 Even if you had had cross-examination
2 and had had expert witnesses in front of you, how
3 could we have dropped what we heard and took
4 testimony on, in favor of that? I mean, I just --

5 MR. BOWERS: I don't know what else I
6 can say --

7 COMMISSIONER KEESE: I'm not sure there
8 is anything you can say.

9 MR. BOWERS: Other than that you may
10 have a situation where two agencies, each with
11 their own jurisdiction over the same issue,
12 reached different conclusions.

13 COMMISSIONER BOYD: Well, that is the
14 dilemma of the moment.

15 COMMISSIONER KEESE: That's, I guess
16 that is the dilemma.

17 COMMISSIONER BOYD: And I was going to
18 ask this question at the end, and sorry for
19 interrupting you, but Chairman Keese did broach an
20 issue that I want to pursue, and he had a slightly
21 different interpretation than I do of what Mr.
22 Douglas said, so I wanted some clarification.

23 I wanted to commend Mr. Douglas for
24 suggesting the MOU approach. And that's something
25 while, neither of the two of us can bind the

1 Commission to, it sounds like both of us took that
2 positively and it's something we want to pursue.

3 But I didn't hear Peter say that you
4 agreed with the timing issue, and that was going
5 to be my question. I mean, the whole issue here
6 could be one of process and timing, and since we
7 can't debate the terms of an MOU at this moment,
8 would you agree or concede the fact that perhaps
9 reports, you know, an earlier sequencing of the
10 Coastal Commission's input would help address some
11 of the dilemma we find ourselves in today, and is
12 that something you see as a solution you'd like to
13 pursue, to make therefore Chairman Keese's
14 interpretation of what you said consistent?

15 MR. DOUGLAS: I appreciate the question,
16 and I think that's one of the issues we're going
17 to have to work out, we embark on coming up with
18 an MOU.

19 Because timing for us is an issue as
20 well, in terms of when we have Commission
21 meetings, when we're able to put together our
22 reports for the Commission, what your timing is
23 once you set certain things in motion.

24 And I can't tell you today whether or
25 not we can reconcile potential differences in

1 terms of timing, but that would be my goal.
2 Because it certainly makes sense from a good
3 government perspective that you have our best
4 input at the time that you have your hearings,
5 provided that we have the ability ourselves to
6 make the kinds of determinations that we need to
7 make when we go to our Commission.

8 So I hope I've answered your question,
9 I'm not committing to the timing, having it come
10 in first, because I don't know yet whether we can
11 actually do that, that should be something that we
12 can work on.

13 COMMISSIONER KEESE: It would be nice to
14 be able to work it out. Evidently, at the
15 earliest stages of the Warren-Alquist Act, when we
16 had an NOI on all projects, it did come in very
17 early in the process, through whatever the Coastal
18 Commission's process was.

19 It would seem to me we could try one way
20 or other to replicate that system.

21 MR. DOUGLAS: You're right, and
22 obviously one of our issues is a plea or an
23 explanation you hear often these days, and that is
24 the lack of staffing to be able to do the work
25 that needs to be done. But you have my commitment

1 to try and work towards that in the MOU.

2 If I may, ask Mr. Luster to try and
3 address the question that Mr. Fay raised, because
4 I think this is an important issue, and I want to
5 make sure that we don't go away from here thinking
6 that somehow the Coastal Commission took action on
7 this habitat issue without substantial evidence.

8 MR. LUSTER: Thank you. I'll just
9 summarize a couple of citations in the report the
10 Coastal Commission provided to you, and then
11 reference the applicable section of the Coastal
12 Act regarding the coastal dune scrub habitat.

13 The Commission recognized that it wasn't
14 designated as ESHA in the LCP, but rather open
15 space. Nonetheless, and I quote, "the Commission
16 considers it environmentally sensitive habitat,
17 given its biological importance, scarcity, and
18 decline throughout the state, consistent with
19 Coastal Act Section 30240 and LUP policies 1101
20 and 1120, ESHA deserves maximum protection."

21 And then, "Coastal Act Section 30240 in
22 part states that development in areas adjacent to
23 environmentally sensitive habitat areas shall be
24 cited, and designed to prevent impacts which would
25 significantly degrade those areas, and shall be

1 compatible with the continuance of those habitat
2 and recreation areas."

3 So the Coastal Commission reviewed the
4 information available to it, and made a
5 determination based on its read of the applicable
6 statutes. Whether it heard something different
7 than you did at your hearing, that may be the
8 case. But the Coastal Commission's interpretation
9 of the Coastal Act led to that conclusion.

10 MR. DOUGLAS: I think the other part of
11 that is, I don't know what you were looking at
12 specifically, whether you were looking at the road
13 and saying that that wasn't the kind of habitat
14 that some people were saying it was, we were
15 applying the Coastal Act policies, which say areas
16 adjacent to habitat.

17 As well as having our biologist working
18 on that, and I doubt that our biologist was before
19 your hearings, because we didn't have the ability
20 to send our staff there. So you may have heard
21 something different, or in a different focused way
22 than what the Coastal Commission heard and what it
23 needed to rely on to make the finding of
24 conformity with the section that Tom just read.

25 But in any event, I understand that if

1 you have a situation where you would think you
2 have the same factual background, and you have one
3 entity making a determination based on substantial
4 issue, and then you see it and you say well, from
5 our perspective there's none, that's what courts
6 are for, and --

7 COMMISSIONER KEESE: That's exactly
8 right.

9 MR. DOUGLAS: -- frankly I think the
10 difference may have been that looking at different
11 standards. And just looking at the road itself --
12 and I'm not sure, because I wasn't there, but I
13 know if I just looked at a road, and the question
14 is is that environmentally sensitive habitat, I
15 would agree, it probably isn't.

16 But at the same time you have to look at
17 the areas adjacent to the environmentally
18 sensitive habitat, and see how you can protect
19 that. In any event, I hope that that helped.

20 HEARING OFFICER FAY: I had a couple of
21 other questions. You mentioned that, if the
22 Commission finds non-compliance, then it should
23 initiate consultation. And I saw that in your
24 pleadings.

25 But I just noticed, here, that the

1 statute distinguished between, on the one hand the
2 standards that the Commission might look at, in
3 terms of conformity, and then the next sentence is
4 -- and that previous sentence says "relevant
5 local, regional, state, and federal standards,
6 ordinances, or laws." And I stress laws.

7 The next sentence says "if the
8 Commission" -- meaning the Energy Commission --
9 "finds a non-compliance with a ordinance or
10 regulation, then it shall initiate consultation
11 with the agencies." One sentence following
12 another, and the second sentence leaves out
13 "laws." Is that significant?

14 And it seems to me that it is, and it
15 also seems to me that we're dealing with a
16 statutory, or a question that if the Committee
17 were to find non-compliance it would be a
18 statutory non-compliance, so I'm just wondering
19 about the role of consultation.

20 Not only because of that question, which
21 of course is kind of a fine reading of the
22 statute, but also regarding the fact that this is
23 not an agency that we just had to inform by the
24 way, we're disagreeing and we're going to override
25 your statute.

1 The Coastal Commission has been with us
2 on this for these, what, four years now on this
3 case. So I think there's been a lot of
4 communication. I'm not sure how much we may learn
5 about each other if we say now consultation
6 begins --

7 MR. DOUGLAS: You might be surprised.

8 HEARING OFFICER FAY: So I guess I'm
9 just asking your views on the significance of that
10 provision, under these circumstances.

11 MR. BOWERS: I don't know that we have
12 any particular perspective on that. This sounds
13 like it's an idiosyncrasy of the Warren-Alquist
14 Act that is better left to your best judgment,
15 together with the opinion of your staff.

16 HEARING OFFICER FAY: One interpretation
17 that I discussed with colleagues, is that that was
18 to ensure that some agency didn't pick up the
19 newspaper and find that the Energy Commission had
20 approved a power plant, notwithstanding the
21 agency's finding that it didn't comply. And so it
22 was to ensure communication. But we've certainly
23 had that over these years.

24 My other quesiton was one raised by both
25 the Applicant and the city, and that is can you

1 point us to a place where the specific provisions
2 in the revised PMPD that either, in your opinion
3 inartfully fail to either adopt or make contrary
4 findings regarding your specific provisions from
5 the report are located, and what our
6 recommendation is to change them?

7 MR. BOWERS: Well, Mr. Luster may need
8 to help me on this, but the specific instance that
9 comes most readily to my mind is the revised PMPD
10 at one point analyzes the basis for the
11 Commission's recommendation of dry cooling.

12 And it makes the point that the
13 Commission's recommendation relies very heavily on
14 the final staff assessment. And then it goes on
15 to embark upon an extended critique of the final
16 staff assessment, and analyze the numerous
17 respects in which the Committee believes the final
18 staff assessment to be flawed in a number of
19 respects.

20 And so you have a visitation there where
21 the Energy Commission seems to be doing indirectly
22 what it probably does not want to acknowledge that
23 it has the ability to do directly.

24 In other words, the RPMPD says on a
25 number of occasions that it is not undertaking or

1 purporting to second guess the judgement of the
2 Coastal Commission with regard to Coastal Act
3 conformity, at least for purposes of 25523B.

4 But then it proceeds to critique the
5 basis for the Coastal Commission's decision, which
6 seems to us at least to be a backhand way of
7 saying to the Coastal Commission we really don't
8 agree with your determination of Coastal Act non-
9 conformity, for purposes of 25523B.

10 Now I readily admit that you also say,
11 in other parts of the RPMPD, that you are
12 rejecting our recommendation on the basis of
13 infeasibility, no question about that. So you
14 have here an RPMPD that has a number of grounds
15 for rejecting our recommendation, only some of
16 which we think to be legally proper. So that
17 was --

18 HEARING OFFICER FAY: So let me get this
19 clear. If it said we reject the Coastal
20 Commission recommendation because substantial
21 evidence in our record shows that there are major
22 engineering problems, or major cost problems with
23 dry cooling, that that might be, in your view,
24 within the ground rules?

25 But if we said that, in addition, we

1 reject it as infeasible because we think that the
2 dry cooling would clash with the LCP as
3 interpreted by the city of Morro Bay, that's where
4 you would say that's not proper?

5 MR. BOWERS: Yes, yes, that's correct.

6 HEARING OFFICER FAY: So we need to
7 delineate, perhaps more clearly, exactly what the
8 infeasibilities are in terms of the respective
9 jurisdictions of the two agencies.

10 MR. BOWERS: And I would add to that,
11 you have a definition of infeasibility in your
12 regulations, in Title 20 CCR. That definition of
13 infeasibility is essentially identical to the
14 definitions of the term infeasibility as they
15 appear in both CEQA and in the Coastal Act.

16 I think there is a minor discrepancy in
17 that one or more of those definitions do or do not
18 include the term legal infeasibility. I just
19 remember looking and comparing them and seeing the
20 term legal in a couple of those definitions and
21 not all three of them.

22 And that would be the other thing that I
23 would encourage you to be very careful about, that
24 there is a definition of infeasibility, and I
25 think that that is the definition that the Energy

1 Commission needs to strictly adhere to when it
2 makes its determination.

3 HEARING OFFICER FAY: Thank you. Mr.
4 Luster, do you have anything to add to that?

5 MR. LUSTER: I'll just add briefly.
6 Yes, the two things that come to mind, and were
7 possibly the genesis of this whole hearing
8 process, was our belief that in your findings of
9 infeasibility you went beyond the strict
10 definition and included determination of LCP in
11 conformity that was different than the Coastal
12 Commission's, and also raised questions as to
13 whether or not the Coastal Commission weighed
14 evidence properly, that sort of thing.

15 And so I think our comment letter on the
16 RPMPD was largely to address, or in part to
17 address those issues.

18 HEARING OFFICER FAY: The Chairman asked
19 -- in addition we included things that, as far as
20 we could tell were not in your purview -- and the
21 Coastal Commission will probably have no concern
22 about those, is that correct?

23 Infeasibility was found in an area that
24 is not one of the seven topics in the Coastal
25 Commission's report to the Energy Commission?

1 COMMISSIONER KEESE: Perhaps that's not
2 a fair question.

3 HEARING OFFICER FAY: The last item on
4 the seven is anything else the Commission decides
5 to tell the Energy Commission about.

6 MR. DOUGLAS: Did we weigh in on the
7 question of infeasibility, Tom?

8 HEARING OFFICER FAY: I believe you did.

9 MR. LUSTER: Yes, well, the
10 recommendations that we made, the specific
11 provisions were those that the Coastal Commission
12 believed were feasible.

13 MR. DOUGLAS: And then of course you
14 have to make your own independent determination,
15 and if somebody doesn't like that, then it goes to
16 a judge to decide.

17 MR. LUSTER: I believe that, in answer
18 to your question, for those aspects of a proposed
19 project that may affect coastal resources but are
20 ones that the Coastal Commission does not weigh in
21 on, does not provide you findings or specific
22 provisions, then you're determination of
23 feasibility has -- there's no Coastal Act
24 connection.

25 MR. DOUGLAS: Well, in any event, what

1 we tell you on feasibility is just input, so you
2 make that determination.

3 HEARING OFFICER FAY: And one last
4 question, on the last page of your second letter
5 of February 25th, if I can call it your reply
6 brief, you state that "Section 30519B of the
7 Coastal Act retains for the Coastal Commission
8 jurisdiction over portions of projects seaward of
9 the mean high tide line."

10 And I just wondered why that was added.
11 Is that relevant to this project in your view, to
12 the Morro Bay Project?

13 MR. LUSTER: I believe there were
14 questions raised in one of the parties opening
15 briefs regarding Coastal Commission jurisdiction,
16 since there weren't any structures or activities
17 occurring offshore, did the Coastal Commission
18 have any jurisdiction at all.

19 Our response there was in part to
20 address the Commission's retained jurisdiction in
21 title waters, and what was unstated is our
22 definition of development includes activities that
23 withdraw sea water or discharge to sea water.

24 So even though there's not a new
25 structure going out into the coastal waters there,

1 the proposed activities fall within the Coastal
2 Act's definition of development, and therefore
3 provide the Coastal Commission with jurisdiction.

4 MR. DOUGLAS: And if it were within our
5 jurisdiction and isn't pre-empted by the Energy
6 Commission, then the standard of review would be
7 chapter three of the Coastal Act, that is, the
8 resources sections that apply to any projects in
9 marine waters.

10 It would not be the Local Coastal Plan,
11 because that does not extend out into the area of
12 original, permanent jurisdiction that the Coastal
13 Commission retains. But this is more of a
14 hypothetical than --.

15 HEARING OFFICER FAY: Okay. So that was
16 not to raise anything new in terms of our
17 proceedings, because clearly you had jurisdiction
18 to participate in our proceeding and did so. But
19 this is the first time I saw this, that's why I
20 wondered.

21 MR. LUSTER: Yes, I think it was just to
22 address a point made in one of the party's briefs.

23 COMMISSIONER KEESE: Actually, it was
24 somewhat what I brought up when I read it too, it
25 sounds like you don't retain jurisdiction for

1 anything that's above -- is that -- when it says
2 "retains for the Coastal Commission jurisdiction
3 over portions of projects seaward of the mean high
4 tide line."

5 So if it's seaward you have it, and if
6 it's above that it's the appellate jurisdiction,
7 is that what I'm--?

8 MR. DOUGLAS: That's essentially right.

9 MR. BOWERS: Yes.

10 MR. DOUGLAS: There are some situations
11 where one could argue that you've got public trust
12 lands that may have historically been public
13 trust, but because of alterations in the actual
14 land configuration they're now above the mean high
15 tide line. Those are retained in our original
16 jurisdiction as well, if they're public trust
17 lands and can be shown as such.

18 COMMISSIONER KEESE: Okay, thank you.

19 HEARING OFFICER FAY: Well, we'd like
20 to, I know we said 20 minutes, and most of the
21 parties, except the city have pretty much used
22 that up. But we'd like to offer a very brief
23 rebuttal of about five minutes if the parties wish
24 to do that, and we're certainly not begging them
25 to do so. Mr. Ellison, anything further?

1 MR. ELLISON: Just two points. One,
2 with respect to the Energy Commission staff
3 position that under 25523B the specific
4 recommendations must be adopted in order for the
5 Commission to find compliance, if I understood the
6 staff's position correctly, they're arguing this
7 as a principle of logic.

8 I don't think that they're saying that
9 compliance is expressly part of 25523B, but rather
10 the logic that if you don't adopt all of the
11 recommendations that were based upon compliance
12 that you therefore have no choice logically other
13 than to find non-compliance. I assume that that's
14 correct.

15 I would point out to the Commission that
16 one of the bases for rejecting a Coastal
17 Commission recommendation is that you have adopted
18 something that is more protective of the
19 environment.

20 And in fact, with respect to dry
21 cooling, that's one of the findings that you've
22 made in this case, that you believe that habitat
23 enhancement is more protective of the environment
24 in this particular situation than dry cooling
25 would be.

1 I think it is logically inconsistent to
2 be in the position of saying because we have done
3 something more environmentally protective we have
4 to find non-compliance with an environmental
5 statute.

6 The second thing I want to respond to is
7 this issue of the one stop siting process, and
8 whether that's really threatened here. I think
9 that it is.

10 I understood the staff's position to
11 be -- and I think it's literally correct -- that
12 nobody is suggesting that there be more than one
13 permit here. But if you think about some of the
14 positions that have been stated here, there really
15 is a one stop siting issue here.

16 If the Committee and the Commission goes
17 forward and says we're only going to have one
18 permit, but compliance is going to be determined
19 at another agency, subject to a separate hearing
20 process, and Mr. Bower even mentioned a separate
21 litigation path for the Coastal Commission's
22 report, as a practical matter that really is a
23 change from one stop siting.

24 You now have Applicants having to appear
25 in front of more than one agency at different

1 evidentiary hearings to address essentially the
2 same issues, and even separate litigation paths
3 associated with them.

4 And a litigation path that would have to
5 be resolved before the Energy Commission could
6 then decide whether the Coastal Commission's
7 report did or did not comprise substantial
8 evidence that it could consider in its process.

9 I hope that the agency's going forward
10 are going to negotiate some kind of a MOU, and I
11 hope that these timing issues can be resolved, and
12 I also hope that when you do that that you can
13 come up with a process that respects not only the
14 fact that the one stop siting process involves a
15 single permit, but that it also involves
16 essentially a consolidated hearing process. Thank
17 you very much.

18 HEARING OFFICER FAY: Thank you. Staff?

19 MS. HOLMES: Three quick points. First
20 of all, there was a discussion earlier this
21 afternoon about a concern that the Committee
22 expressed that, with respect to the Morro
23 shoulderbound snail issue, it might have been
24 backed into a corner into making decisions that it
25 felt were not supported by substantial evidence.

1 The first point I would like to make,
2 with respect to that, I would really hate to see
3 the Energy Commission base its interpretations of
4 its statutes under the assumption that another
5 agency is going to violate the law and adopt
6 findings that are not supported by substantial
7 evidence.

8 In this particular instance the
9 recommendations that are being referred to were
10 supported not just by staff but by Coastal
11 Commission, by the California Department of Fish
12 and Game, by U.S. Fish and Wildlife, and by also I
13 believe state Parks and Rec.

14 I don't think that recommendations by
15 all of those resource agencies does not constitute
16 substantial evidence upon which the Commission
17 could legally base a decision.

18 A second point having to do with timing
19 that I would just point out as we go forward has
20 to do with when the Coastal Commission's report
21 comes to the Energy Commission. I think it is
22 important that it come to the Commission before
23 hearings, so that if there are questions about
24 feasibility or the environmental affect of the
25 measures that are included in the report, those

1 can be properly aired at the hearing as well.

2 And finally I'd like to address the
3 point having to do with who makes the consistency
4 determination with respect to those Coastal Act
5 provisions for which the Coastal Commission has
6 recommended that specific measures be adopted.

7 We think that there's a special role for
8 the Coastal Commission in the Energy Commission's
9 process, especially with respect to Coastal Act
10 conformity findings. It is the Energy Commission
11 that makes those findings, they are contained in
12 the Energy Commission's decision, but the Coastal
13 Act has a special role, as we've discussed in
14 making those and providing input into those
15 findings.

16 I'd like to point out that the
17 interpretation that we've presented gives meaning
18 to both the language in 3413, 25523 and 25525. We
19 don't find an ambiguity between the statutes. And
20 I want to take for a moment an alternative
21 interpretation to the one that I believe is
22 supported by the Applicant and the city.

23 One that the Energy Commission makes its
24 determination of Coastal Act consistency,
25 exclusive of the report that's filed by the

1 Coastal Commission pursuant to 25523B.

2 Let's take the situation like that in
3 this very case, but let's assume for a moment that
4 the Energy Commission found dry cooling to be a
5 feasible alternative.

6 In that situation, what we have is the
7 Energy Commission has found that the project is
8 consistent with the Coastal Act and with the LCP,
9 pursuant to its independent authority, but is
10 nonetheless required to mandate that the Applicant
11 implement dry cooling.

12 I think its an absurd result to say that
13 the Energy Commission must require a potentially
14 extensive or expensive measure when it has
15 determined that they are not necessary to ensure
16 conformity with the Coastal Act.

17 We think that this absurd result is
18 avoided by our interpretation. Our interpretation
19 is not perhaps elegant, but it's the only one that
20 we believe avoids absurd results, as well as gives
21 meaning to all portions of the relevant statutes.
22 Thank you.

23 HEARING OFFICER FAY: Thank you. The
24 city? Anything further?

25 MR. SCHULTZ: Good afternoon again.

1 Just briefly, I would respectfully disagree with
2 the Coastal Commission's interpretation on your
3 inability to interpret the LCP. I find that in
4 direct conflict with 253B, which gives you that
5 ultimate jurisdiction to make the findings,
6 whether it's in compliance with.

7 Obviously you still have to look at B of
8 that section, and adopt the provisions that they
9 specify will meet the objectives of the Coastal
10 Act, but it does not say anywhere in there that
11 you cannot make your own finding. In fact, D
12 allows you to make that finding. So I think they
13 can be read separately and also together.

14 And then the only other comment is, with
15 regards to the evidentiary hearings, that wasn't
16 only an hour evidentiary hearing, if you want to
17 call it an evidentiary hearing, I would call it a
18 public hearing. The city was allowed three
19 minutes to speak at that hearing, whereas opposed
20 to all of the other evidentiary hearings we were
21 able to cross-examine and examine witnesses.
22 Thank you.

23 HEARING OFFICER FAY: Thank you.
24 Anything further from the Coastal Commission?

25 MR. DOUGLAS: I don't think so, unless

1 you have different questions. Well, let me make
2 one point, relative to the last point that was
3 made about determining conformity with the LCP.

4 What we're saying is that, in the
5 context of determining feasibility, the fact that
6 the Coastal Commission made the determination that
7 dry cooling would be consistent, we think that
8 that is binding for purposes of determining
9 feasibility, because that's not something that I
10 think should go into your determination of whether
11 its feasible to go to dry cooling. And you didn't
12 have to. You used other factual evidentiary bases
13 for that determination.

14 HEARING OFFICER FAY: Am I correct,
15 though, in assuming that, under the circumstances,
16 with the Committee having determined that the dry
17 cooling is not feasible, and therefore that takes
18 us down a different path, that it doesn't matter
19 very much whether the Energy Commission says
20 anything about the compatibility of this project
21 using dry cooling with the requirements of the
22 Coastal Act? It's mooted out.

23 MR. DOUGLAS: I think so. As long as--
24 that's what we're saying. If you make your
25 determination of infeasibility based on applying

1 your definition, you don't have to get into
2 questions of whether or not its consistent with
3 the Coastal Act or the LCP. That's the way I read
4 it.

5 HEARING OFFICER FAY: I don't recall
6 that the Committee said that one of the reasons to
7 reject this is that if it used dry cooling it
8 would not be a coastal dependent facility, and
9 therefore it would not be considered under the
10 Coastal Act, but we can --

11 COMMISSIONER KEESE: That argument was
12 raised by one of the parties.

13 MR. DOUGLAS: Right. We're just trying
14 to confirm that and support that interpretation
15 that you were just mentioning.

16 HEARING OFFICER FAY: Thank you. We'd
17 like to take public comment. Mr. McCurdy came all
18 the way up from Morro Bay, and we'd like to give
19 him a chance to address this committee.

20 MR. MCCURDY: Thank you Mr. Fay. Good
21 afternoon, members of the Committee. My name is
22 Jack McCurdy, I'm President of the Coastal
23 Alliance and Planned Expansion, CAPE, we're
24 Intervenors in the process, and yes it has been
25 over four years.

1 CAPE believes that the arguments of the
2 Applicant and the city of Morro Bay in this
3 proceeding are wholly without merit. We strongly
4 support the reasoning of the Coastal Commission
5 and the Energy Commission staff as to the
6 mandatory role for the Commission in determining
7 the projects compliance with the Coastal Act.

8 We believe the CEC should be required to
9 override the Coastal Commission's findings of the
10 proposed project's inconsistency with resource
11 protections under the Coastal Act, if it can be
12 shown that dry cooling would be infeasible, which
13 we believe is not supported by a careful and
14 objective reading of the record.

15 Specifically, the Applicants contention
16 that it was denied a proper opportunity for
17 hearing and public comment is false. Duke had
18 ample opportunity to comment on the staff report
19 on the project at the critical juncture, when it
20 was adopted by the Coastal Commission on December
21 12, 2002.

22 It did so in a perfunctory manner
23 without counsel speaking, and as far as I know,
24 without submission of a letter or documents
25 presenting its position in detail, prior to the

1 meeting, to the Commission. It had more than
2 ample opportunity and failed to take advantage of
3 it.

4 Duke also claims tat the Coastal
5 Commission's attempting an "end run" around the
6 CEC's hearing process, with the support of CAPE
7 and CEC staff, through submission of its report to
8 the CEC after all the evidence in the case was
9 submitted.

10 How convenient. Duke would have the
11 Coastal Commission submit its report before the
12 record was completed, providing a convenient
13 opening for Duke to accuse the Commission of
14 acting prematurely.

15 Duke accuses the Coastal Commission of
16 relying on evidence that the Presiding Committee
17 found not to be credible, and that the Coastal
18 Commission now is relying on such evidence to
19 impose a finding that the CEC must adopt or
20 override.

21 It is amazing that Duke can find the
22 evidentiary record so objective, so beyond
23 question, so beyond interpretation, when in fact
24 its own reading of the record -- and by the way,
25 the PMPD's assessment of it -- were both highly

1 selective to oppose dry cooling support habitat
2 enhancement.

3 As a responsible agency with unrivalled
4 experience with and knowledge of coastal
5 resources, no one is better qualified to review
6 evidence about impacts on an estuary and reach its
7 own independent conclusions than the Coastal
8 Commission.

9 Duke asserts that the city is primarily
10 responsible for enforcing and interpreting its LCP
11 in the context of specific proposed land uses, and
12 not the Coastal Commission. This is false for two
13 reasons.

14 One, as the Coastal Commission has
15 pointed out, the Coastal Act provides the
16 Commission with appellate authority over energy
17 projects.

18 Secondly, anyone familiar with land use
19 matters under LCP's knows that actions of local
20 agencies within the coastal zone can and are
21 routinely appealed to the Commission as a matter
22 of practice.

23 It is clear that, absent the Presiding
24 Committee's finding that dry cooling would not be
25 feasible on the constrained site of the proposed

1 replacement plant, the Energy Commission would be
2 required to accept dry cooling as best available
3 technology, as required by the Coastal Commission.

4 This is because it would be unable to
5 override the Coastal Commission on grounds of
6 infeasibility. The Presiding Committee last year
7 determined that the site would not be feasible for
8 dry cooling units, but now that is not the case.

9 The Committee had accepted Duke's
10 argument that the replacement plant had to be
11 built on a different site than that of the
12 existing plant. That in part was because, as an
13 economic necessity, the existing plant needed to
14 remain in operation in order to provide a revenue
15 stream for Duke, even though no testimony was ever
16 presented to demonstrate an economic burden if
17 that sequence of construction and tear-down was
18 not allowed.

19 Now, however, the plant is not
20 operating, and most of the employees have been
21 laid off. Two of the four units have been placed
22 in what a Duke spokesman described as "cold
23 shutdown". The other two were damaged in the
24 December 22nd earthquake and rendered inoperable.

25 Even though one and possibly both of

1 these damaged units may have been repaired, the
2 Duke spokesman was quoted in the San Luis Obispo
3 county media as saying that "we don't expect the
4 plant to run in the near term." This is because
5 of the low demand for energy in the state and the
6 inability of the aging units to produce
7 electricity at a competitive price, he said.

8 So for all intents and purposes the
9 plant is shut down with little prospect of it
10 producing energy. This means that there is no
11 substantial evidence to conclude that dry cooling
12 is infeasible because of constructability issues.

13 Therefore, the Coastal Commission
14 recommendation for dry cooling is exactly
15 relevant, and should not be overridden because it
16 cannot be demonstrated that dry cooling isn't
17 feasible.

18 Therefore, an override pursuant to
19 Public Resources Code 25525 is not warranted,
20 because, based on the record, the CEC cannot make
21 a finding that the Morro Bay Project is "required
22 for public convenience and necessity and that
23 there are no more feasible and prudent means of
24 achieving such public convenience and necessity."

25 The Presiding Committee itself should

1 reopen the record to make it current with respect
2 to new conditions at the site.

3 The Coastal Commission finding for dry
4 cooling is also relevant in another important way,
5 and that is because the mitigation for entrainment
6 approved in the PMPD is likely to be unacceptable
7 under new EPA rules for existing power plants,
8 which were issued several weeks ago and are not
9 yet final.

10 The new rules contain requirements that
11 would render the inhabit enhancement program
12 unacceptable as mitigation for entrainment caused
13 by once through cooling.

14 The Central Coast Regional Water Quality
15 Control Board has recognized this eventuality and
16 has canceled its scheduled April 2nd hearing on
17 NPDS permit for the project, based on HEP, because
18 "the Regional Board staff has concluded that
19 significant revision of the draft NPDS permit may
20 be necessary."

21 A board staff member said among the
22 concerns is a requirement in the new rules that a
23 new client using once through cooling may require
24 a reduction in its larval mortality from 60 to 90
25 percent.

1 If the rules do invalidate the presently
2 designed HEP as mitigation, a reconsideration of
3 HEP is in order at a minimum, and it is possible
4 that any such "restoration plan" would be ruled
5 out as a practical matter, leaving the Coastal
6 Commission's recommendation for dry cooling as the
7 only realistic option.

8 Of course, all of this may change rather
9 soon when the plaintiffs who won the Second
10 Circuit decision on February 3rd invalidating the
11 restoration plans for new plants filed suit to
12 overturn such mitigation for existing plants.

13 If, as expected, that suit is
14 successful, the CEC, as well as the Water Board,
15 will have no legal grounds for accepting habitat
16 enhancement as mitigation, and some form of closed
17 cycle cooling will have to be adopted, as
18 recommended by the Coastal Commission and mandated
19 by federal regulation.

20 Let me just add that CAPE is very
21 disappointed that its legal counsel was unable to
22 submit briefs and participate in the hearing.
23 Less than 30 days notice was given for this
24 hearing, and even for the briefs less time. This
25 is inadequate to allow a non-profit Intervenor to

1 participate.

2 Because his caseload and his schedule
3 was impacted, it prevented him from being here to
4 contribute. Our objections to this scheduling of
5 the hearing were made known, but were unheeded.
6 Thank you very much.

7 HEARING OFFICER FAY: Thank you.

8 COMMISSIONER KEESE: Thank you.

9 HEARING OFFICER FAY: And we also have
10 John McKinsey.

11 MR. MCKINSEY: Good afternoon, Chairman
12 Keese, Commissioner Boyd, Hearing Officer Fay. My
13 name is John McKinsey, I think some of you know
14 who I am. I appear today on behalf of an
15 interested party in another proceeding, on behalf
16 of El Segundo Power Two LLC, who also has a
17 existing power plant in the coastal zone, and has
18 proposed to repower it.

19 And several of the questions that you
20 have proposed in this hearing are fairly broad,
21 and in fact even in the context in which we are
22 discussing them today are fairly broad in terms of
23 talking about what should be the role of the
24 Coastal Commission and the things that they say or
25 do in an Energy Commission siting process.

1 And I would agree, the issues have been
2 very well briefed, and even the discussion today
3 has been very well in-depth, but I think there may
4 be something that you are missing in the bigger
5 picture of things.

6 There's been a lot of focus on the
7 portions of the Public Resources Code that direct
8 the Energy Commission to do certain things with a
9 so-called 30413D report. But if you look a little
10 more closely at section 30413, you're actually
11 going to find that there are really only two
12 particular ways in which you're going to hear
13 something or get something from the Coastal
14 Commission in an Energy Commission proceeding.

15 And I think before you can really decide
16 whether you're going to give it a certain
17 treatment or another treatment you have to begin
18 by trying to decide, when you hear something, or
19 you get a written document or a statement from the
20 Coastal Commission in an Energy Commission
21 proceeding, what weight must you give it and what
22 treatment must you give it?

23 And section 30143D has a particular and
24 very specific detailed report that the Coastal
25 Commission is authorized to provide in response to

1 an NOI. And I'm not trying to beat to death the
2 issue regarding whether an AFC is an NOI, it's
3 certainly not, and the law is clear on that.

4 However, what I clearly understand is
5 there's an intent by the Energy Commission to
6 uphold the spirit of the Warren-Alquist Act, which
7 was to give the Coastal Commission some type of
8 preliminary, and some type of binding statement
9 regarding the compliance of a power plant project
10 in the coastal zone.

11 But what's getting lost partly in this
12 is that, just because the Coastal Commission says
13 something or issues a document doesn't make it at
14 30143D report. And to figure that out you've
15 really got to look at section 30143D.

16 And it has two particular requirements,
17 and that first one is -- this one that we have a
18 hard time grappling with -- is that it says that
19 they have to analyze an NOI and then provide a
20 report with specific findings or at least areas
21 they can report on, and they have to do that prior
22 to the preliminary report in the NOI.

23 That, in and of itself, is something
24 that I think we're kind of struggling with, since
25 by virtue of our processes that we undertook in

1 the last five years we've essentially eliminated
2 NOI's. And so, I kind of understand the idea that
3 somehow you still want to receive a report from
4 the Coastal Commission, and give it some kind of
5 special treatment.

6 Now the special treatment that it must
7 be given is what you've been trying to grapple
8 with, in terms of 25523 or 25525B and D. I think
9 the treatment is very clear. The treatment that
10 you must give it is certainly that you either have
11 to find if you do not include in your decision the
12 provisions in that report, assuming that there is
13 a report, then you either have to find it
14 infeasible or conclude that it would have caused
15 more significant impacts than your choice.

16 But I think part of the problem may be
17 in deciding when you've received something that is
18 such a report. And there is really an answer
19 lying for you in the next section, which is
20 30143E. That very specifically grants the Coastal
21 Commission the opportunity to participate as a
22 party in other proceedings, including an AFC
23 proceeding.

24 In other words, the fact that the
25 Coastal Commission may issue documents or submit

1 reports does not automatically make them a 30143D
2 report. And if they're not a 30143D report then
3 they are comments by certainly a very interested
4 sister agency in the state of California
5 responsible for the coastal resources.

6 But that means that they don't have any
7 type of binding effect on the Commission in trying
8 to resolve the outcome. So then the only real
9 question that remains is when do you have before
10 you a section 30143D report?

11 And I concur entirely and I think most
12 applicants concur entirely that they would like to
13 have some kind of certainty to that. And the idea
14 of having an MOU or some type of official policy
15 by the Energy Commission, "if this happens then we
16 will consider that to be a 30143D report", would
17 be very helpful -- especially in light of the fact
18 that, by virtue of the law, it would appear that
19 there can't possibly be a 30143D report in an AFC
20 proceeding.

21 But in addition I think that you
22 shouldn't treat something as a 30143D report
23 unless it meets two particular requirements, and
24 one of them I think you've discussed in great
25 detail -- but it's hard to come to an answer --

1 and that's the timing.

2 But I'd like to take you back to clearly
3 what the Warren-Alquist Act intended when it
4 granted the Coastal Commission this authority in
5 that it required that the NOI, which was the
6 preceding part to an AFC, that they said even then
7 it had to be in an early point in that proceeding,
8 implying that they get one opportunity to make a
9 report, making their seven particular areas that
10 they're obligated to report, on all seven of them.

11 And then, from that point on, that was
12 their only official binding report. And anything
13 that came after that had to be considered their
14 role as a party, which was to present evidence, to
15 examine witnesses, and to cross-examine witnesses.

16 So in the case of Morro Bay, which is
17 really not what I'm speaking about today, you've
18 got an issue of a report that's arriving
19 incredibly late, but I would suggest that anything
20 that arrives after somewhere in the mid-point of
21 the party's trying to evaluate the project and
22 trying to come up with what they think is their
23 mitigation, and the staff trying to draft their
24 staff assessment, that's when the report has to
25 arrive.

1 I don't think the staff can properly
2 issue their final staff assessment if they don't
3 have that report from the Coastal Commission. And
4 if it arrives after that, unfortunately at that
5 point it becomes testimony from the Coastal
6 Commission, irregardless of the name or label they
7 put on it.

8 And then secondly, to be reporting in
9 addition to meet some type of early requirement to
10 embody that spirit of the Warren-Alquist Act,
11 there's still the very clear and specific
12 requirements of section 30143D that it has to, and
13 it uses the term "must address all."

14 And particular in there is that, in
15 addition to trying to say we think this does not
16 comply or we think this does not conform, they
17 have to provide alternatives. They have to say
18 this is what we think is the solution.

19 What that means is that in that report
20 what you should really have is a bunch of
21 potential provisions that you can either reject or
22 accept, and if you reject you have the authority
23 to reject them under two bases.

24 Thus, the idea that a section 30143D
25 report, should it be a report, also somehow

1 requires you to do a separate override because it
2 acts as a binding determination of whether a
3 project does or does not comply with the Coastal
4 Act, doesn't really jive.

5 It's the general principle that when a
6 Legislature enacts a law, if they choose to
7 specify one thing, then that clearly implies that
8 they didn't imply another. And they're very clear
9 in section B, they say that you can override, or
10 at least choose not to include a provision in a
11 report if you find it is infeasible, or if you
12 find that it would cause more significant impacts.

13 That is the only thing that you have to
14 do with a section 30143D report. There's nothing
15 in section D that suggests that somehow you must
16 then grapple with it again. And thus that also I
17 think addresses the very particular issue of who
18 has the ultimate authority in siting.

19 And I think the Warren-Alquist Act and
20 the exemption that they make in the Coastal
21 Commission's jurisdiction makes it clear that the
22 Energy Commission is the responsible agency with
23 jurisdiction in permitting power plants.

24 However, that must also mean that the
25 Coastal Commission, in trying to make a decision

1 as to whether something is going to or not going
2 to comply with the Coastal Act, does not have the
3 final word, because the Energy Commission does.

4 And the only way in which the Energy
5 commission is constrained, versus the Coastal
6 Commission, is if it's in a section 30143D report,
7 then they must either A, find it to be infeasible,
8 or B, conclude that it will cause more impacts.
9 Otherwise they have to include it as a provision
10 in the project.

11 The more practically -- and it goes back
12 to my main point -- the idea that somehow the
13 30143D report could turn into a casual and
14 continuing ability for the Coastal Commission to
15 continue to make comments about what they think
16 will be the next way to make the project
17 compliant, is clearly not what was intended by the
18 Warren-Alquist Act.

19 The Warren-Alquist Act gave them the
20 opportunity to participate as a party -- they
21 could choose or not choose to do that -- but the
22 only thing it gave them that was binding was a
23 very initial early on in the process report.

24 And that enabled the Energy Commission
25 to then run their process, in it's open, bending

1 and flexible way, of trying to find the mitigation
2 and find the solutions. A very unique process
3 which is at the core of the Warren-Alquist Act.

4 And so it is really at, of issue today -
5 - and it's partly confronting us in our El Segundo
6 Project -- is what happens when the Coastal
7 Commission is late, what happens when the Coastal
8 Commission hears that the Energy Commission has
9 come up with a solution?

10 Does the Coastal Commission get another
11 cut at that pie, do they get another opportunity
12 to say "well, we disagree with your proposed
13 mitigation." And the answer is pretty clear, no.

14 They get the opportunity to participate
15 as a party and comment, but the only initial thing
16 that they get to do that creates some degree of
17 binding obligation on the Energy Commission is
18 that report, which, pursuant to the Warren-Alquist
19 Act and the Public Resources Code, had to be
20 during that NOI proceeding and it had to address
21 the NOI.

22 Secondly, in any type of MOU-- and I've
23 kind of already said this -- but in addition to
24 requiring it to be early, you really have to
25 scrutinize whether it contained all of those seven

1 elements.

2 And if it didn't it's not a report, and
3 you certainly don't have an obligation to treat it
4 as such a report. I think that may be more of an
5 issue for us in El Segundo, but because we're
6 asking these broad questions these are things that
7 need to be thought about.

8 And finally, I would say that I agree
9 with the idea of trying to develop an MOU. But
10 certainly that may involve some other public
11 process, and that's partly a significant legal
12 question as to what would be required to adopt an
13 MOU.

14 That's attempting, essentially, to write
15 a little bit of law. And you've got to think
16 carefully about what you have the ability to do.
17 If the Warren-Alquist Act is very clear and the
18 Public Resources Code is very clear as to when the
19 Coastal Commission can bind the Energy Commission,
20 I don't know how much you can deviate from that in
21 an MOU or in a Declaration, without having to
22 really check your legal foundations to do so.

23 COMMISSIONER KEESE: Thank you, Mr.
24 McKinsey. And I would mention something that may
25 be of interest to you and to the Coastal

1 Commission. At this morning's Commission meeting
2 we decided that Mr. Boyd would join me on the El
3 Segundo Committee.

4 COMMISSIONER BOYD: What did I do wrong?
5 (laughter)

6 COMMISSIONER KEESE: He's going to
7 extract something from me. His Advisor, Mike
8 Smith, was my Advisor on the El Segundo case
9 during its initial phases.

10 So we are both grappling with an issue
11 that, in slightly different form, appears in both
12 of those cases. And I thank you for your
13 explanation.

14 MR. MCKINSEY: Thank you.

15 COMMISSIONER KEESE: It looked like
16 somebody -- Mr. Douglas?

17 MR. DOUGLAS: Yes, just one observation
18 relative to the question that Mr. Fay raised, that
19 you don't make a determination about consistency
20 with the LCP in your determination of feasibility.

21 And indeed there are such
22 determinations. If you look at, starting at page
23 337 and forward, there are several references
24 there to the city's determination of consistency
25 or conformity with their ordinance of non-

1 conformity, which we think that's a determination
2 that the Coastal Commission makes, relative to its
3 authority.

4 And you don't need that for purposes of
5 determining feasibility. So we're just suggesting
6 that you go through there and take out those
7 references relative to your determination of
8 feasibility or infeasibility. Thank you.

9 HEARING OFFICER FAY: Thank you. So,
10 Commissioner Boyd, have you been impinged or
11 entrained in the El Segundo case?

12 COMMISSIONER BOYD: A little of both I
13 think.

14 HEARING OFFICER FAY: Same result, huh?
15 It's painful.

16 Are there any other members of the
17 public who would like to address the Committee?
18 All right. For my part, I think this was a very
19 thorough, thoughtful and in-depth examination of
20 this rather thorny area.

21 And for those of you who happened upon
22 this hearing inadvertently I'm sure you've learned
23 more than you ever wanted to know about these
24 subtleties.

25 Thank you all for coming, we are

1 adjourned.

2 (Thereupon, the hearing ended at 3:08 p.m.)

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I, PETER PETTY, an Electronic Reporter,
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